IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 370 OF 2007

Mrs. Santosh Sunil Arora. ... Petitioner.

V/s.

St. John's Apartments & Ors. ... Respondents.

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Mr. P.V. Dhakephalkar, Sr. Counsel with Mr. Sachin U. Dhakephalkar for the Petitioner.
Mr. Bhavin Gada i/b. Bipin Joshi for the Respondents.

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CORAM : DR.D.Y. CHANDRACHUD J.

05TH JULY 2007.

P.C. :

. Rule, returnable forthwith. Counsel appearing on behalf of the Respondents waive service.

By consent taken up for hearing and final disposal.

2. The Co-operative Society filed a dispute in the year 2005 against the Petitioner for using a terrace adjacent to Flat 19 situated on the 6th floor of St. John's Apartments Co-operative Housing Society Ltd., Marol, Andheri (East), Mumbai to the exclusion of the other members of the Society. The

application for the grant of an interim mandatory order was rejected by the trial Judge in the Co-operative Court on 20th July 2006. The trial Judge observed that the approved plan prima-facie shows that the entrance to the terrace was from the flat of the Petitioner herein and the society has not been able to make out a prima facie case that the terrace was the common property of the Society. In Appeal, the Appellate Court has reversed the findings of the learned trial Judge and has granted an order of mandatory injunction as prayed.

3. At the hearing of the Petition it has been submitted on behalf of the Petitioner that the Petitioner has been in use and occupation of the terrace exclusively since 1985 and that the agreement under which the Petitioner acquired title on 8th December 1985 specifically provides that the Petitioner was the purchaser of the flat on the 6th floor together with the terrace. The issues which were raised constitute serious triable issues and no mandatory injunction should have been issued at the interlocutory stage. On the other hand, it has been urged on behalf of the Respondent that the reference

to the terrace in the original agreement has been introduced in hand and the terrace would continue to remain common property of the Co-operative Society..

4. Undoubtedly, the rights and contentions of the parties would merit a consideration at the trial before the Co-operative Court. Section 4 of the Maharashtra Ownership Flats Act, 1963 inter-alia stipulates particulars which the agreement must contain. Section 4(1)A(vii) requires the agreement to spell out the nature, extent and description of limited common areas. Sub-clause (a) requires the agreement to specify a percentage of common areas and facilities. In the present case, the society has disputed the contention of the Petitioner that the sale under the transaction of 1985 was not merely of the residential flat but also of the appurtenant terrace thereto. On the other hand, the Petitioner has asserted that she is in lawful use and occupation of the appurtenant terrace for nearly 22 years and the society has never objected to her occupation until a dispute was filed in 2005 after two decades.

5. The Petitioner has prima-facie relied upon the agreement under which she claims to occupy the flat on the 6th floor and the terrace which is claimed to be appurtenant thereto. It will be only appropriate if parties are required to establish their rival cases before the Co-operative Court at the trial. This is not one of those cases where a mandatory order is warranted at the interlocutory stage nearly two decades after the Petitioner came into occupation. The Petitioner has relied upon an agreement dated 3rd December 1985 with the developer. However, the Petitioner will have to be put to terms in the interests of justice.

6. In the circumstances, it would be appropriate to dispose of this petition in terms of the following directions :-

(i) The Petitioner shall fi undertaking before the Co-operative Court within a period of one week from today, not to carry out any construction, either temporary or permanent upon the terrace

during the pendency of the proceedings before the Co-operative Court;

(ii) Conditional on the Petitioner filing the aforesaid undertaking, parties are directed to maintain the status-quo during the pendency of the proceedings before the Co-operative Court;

(iii) The order of status-quo shall not preclude the Co-operative Society from seeking access to the terrace and to the water tank immediately above the 6th floor for the purposes of carrying out maintenance, repair and other urgent work as may be necessitated;

(iv) During the course of the monsoon and thereafter during the pendency of the case before the Co-operative Court, in the event that the Co-operative Society requires such access, the Petitioner shall co-operate with duly authorised personnel for the aforesaid purpose.

7. The order passed by the Co-operative Court shall stand modified in the aforesaid terms. However, it is clarified that all the observations contained in this order are confined to the disposal of the application for interim relief. The Co-operative Court shall dispose of the dispute without regarding these observations as amounting to the expression of any conclusive opinion by this Court on the merits of the rival contentions. The Co-operative Court is requested to decide the dispute by 31st December 2007. The Petition shall stand disposed of.